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INTER RALLY MOTOR SDN. BHD.

v.

KARUPIAH PALANISAMY

HIGH COURT MALAYA, JOHOR BAHRU

JAMES FOONG JC

*b*

[ORIGINATING SUMMONS NO. 24-172 OF 1991]

14 OCTOBER 1991

**LAND LAW:** *Sale and purchase agreement - Qualification to be a "bare trustee" whether there is genuine sale effected when a new charge is created instead of discharge of existing charge. Whether the purported facts of the case have a bearing on s. 340 (2)(2) of NLC.*

*c*

The plaintiffs are the registered owners of the piece of property held under C.T.12015 for Lot No.7819 in the township of Johor Bahru and on which a building is erected thereon known as 87, Jalan Kebun Teh, Johor Bahru (said property).

The plaintiffs purchased this property from Poh Peck Kim and Bay Kuan Wei jointly, under a sale and purchase agreement dated 31 July 1990. This sale and purchase was completed and the plaintiffs became the registered owner of the said property on 30 October 1990.

*d*

The problem the plaintiffs encounter after becoming registered owners of the said property is that there is an occupier in the said property and that is the defendant.

The defendant claims that he is actually the rightful owner of the said property. He alleged that he purchased the said property from one K, under a sale and purchase agreement dated 1 December 1982. As he had completed the sale by paying the full purchase price to K, K was holding the said property on trust for him, even though the defendant did not effect to register his name on the document of title to the said property.

*e*

*Inter alia*, the legal argument posted by the plaintiffs is that s. 340 of the National Land Code provides the plaintiffs, who are the registered proprietors, an indefeasible title to the said property. As such the defendant has no claim over the same.

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The defence maintained their defence mainly on the exceptions provided for under s. 340(2)(c) of the National Land Code.

**Held:***g*

[1] In order to qualify to be a "bare trustee", one must do more than just paying the balance of the purchase price and, handing over possession of the property. This must be followed up with the necessary action to convey the property into the name of the purchaser, as registered proprietor in the document of title. The vendor should execute a memorandum of transfer and, proceed to free the property from any encumbrances, such as charges and, on the part of the purchaser, a caveat should have been placed over the property, to protect his interest during the interim period.

*h*

[2] (In this case), instead of discharging the said property, a fresh charge was created for overdraft facilities to S. Surely, if there was a genuine sale between K and the defendant, this would be the moment to transfer the said property to the defendant and, the defendant can then charge the same to the bank for overdraft facilities to his own company.

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[3] In this case, before the Court, the rights and title of bare trustee is distinguishable from

the facts of the case. In the absence of registration of executed transfer form and no caveat being lodged, coupled with other purported facts disclosed and the statutory declaration made by K, this Court is in doubt whether the sale and purchase of the said property was actually completed. **a**

**[4]** Proceeding further from the above, this Court further finds that the purported facts as alleged by the defendant have no bearings whatsoever on s. 340(2)(c) of the NLC, to make the title or interest of the plaintiff defeasible. **b**

**[5]** Both Poh and Bay were not persons purported to have exercised any powers or authority conferred by written law to have acquired the said property unlawfully.

Both Poh and Bay were in fact ordinary purchasers exercising their ordinary legal rights to purchase a property for valuable consideration. They were not persons, whose power and authority were conferred by statutory law of which, this particular provision of the NLC is meant to apply. **c**

**[6]** The second major contention that the sale by private treaty between K and Poh and Bay after an order for sale was granted, in pursuant to foreclosure proceedings instituted by the said bank, is unlawful. As it is unlawful, s. 340(2)(c) of the NLC will also apply to make the title and interest of the plaintiff defeasible. **d**

**[7]** In this case before this Court, the defendant has not adduced any evidence to the contrary that, the laid down procedure under s. 266(1) of the NLC, was not complied with when Poh and Bay purchased the said property from K, after an order for sale was made thereto. Such being the case, one cannot say that this sale and purchase was unlawful.

**[8]** The plaintiffs are purchasers in good faith and for valuable consideration of the said property. The plaintiffs have the added protection under the proviso of ss. (3) of s. 340 of the NLC, where their title or interest cannot be set aside once registered. **e**

*[The Court granted the plaintiffs' prayers cited in the originating summons.]*

**Cases referred to:**

*Chua Hee Hung & Ors. v. OBE Supreme Insurance Bhd. [1990] 1 MLJ 480 (dist)* **f**  
*Karupiah Chettiar v. Subramaniam [1971] 2 MLJ 116 (cit)*  
*Chartered Bank v. Packiri Maideen & Anor. [1963] MLJ 276 (dist)*  
*Chung Khiaw Bank Ltd. v. Lau Ah Yen & Anor. [1989] 2 MLJ 247 (foll)*

**Legislation referred to:**

National Land Code 1965, ss. 266(1), 226(2), 340(2), (3)(c)

*For the plaintiff - Varughese, Kumar; M/s. Netto & Partners* **g**  
*For the defendant - H.L. Tennakoon; M/s. H.L. Tennakoon*

**JUDGMENT**

**James Foong JC:**

The plaintiffs in this case are the registered owners of the piece of property, held under CT 12015 for Lot No. 7819, in the Township of Johor Bahru and, on which a building is erected thereon known as 87, Jalan Kebun Teh, Johor Bahru. (This property shall hereinafter be referred to as "the said property"). **h**

The plaintiffs purchased this property from Poh Peck Kim and Bay Kuan Wei (hereinafter

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- a** shall be referred to as Poh and Bay) jointly, under a sale and purchase agreement dated 31 July 1990. This sale and purchase was completed and, the plaintiffs became the registered owner of the said property on 30 October 1990.

The problem the plaintiffs encountered after becoming registered owners of the said property is, that there is an occupier in the said property and, this is the defendant.

- b** The plaintiffs are now seeking:

- (a) a declaration that the plaintiff has the right to vacant possession of the said property; and
- (b) for an order that the defendant do quit and vacate the said property; and
- (c) damages against the defendant to be assessed

- c** (d) costs.

- d** The defendant contended in his affidavit in reply, that he is actually the rightful owner of the said property. He alleged that he purchased the said property from one Kumarasamy a/l Nadarajah (hereinafter referred to as Kumarasamy), under a sale and purchase agreement dated 1 December 1982. As he had completed the sale by paying the full purchase price to Kumarasamy, Kumarasamy was holding the said property on trust for him, even though, the defendant did not effect to register his name on the document of title to the said property.

- e** In support of the defendant's contention, a statutory declaration was filed by Kumarasamy. Kumarasamy stated therein that he was the registered owner of the said property before it was transferred to Poh and Bay. On 1 December 1982, he entered into a sale and purchase agreement with the defendant, for the sale of the said property for a sum of RM158,000. An initial payment of RM32,000 was paid, with the balance to be settled by the defendant to Kumarasamy within 1½ years from the 1st of December 1982. Sometime in June 1984, the defendant approached Kumarasamy, to request him to raise some money for the defendant's company, by the name of Saravana Construction Co. (hereinafter shall be referred to as Saravana). Kumarasamy agreed and, he allowed the said property to be charged to Malayan Banking Bhd., for overdraft facilities granted to Saravana.

- f** Kumarasamy stated that, the defendant then settled the balance of the purchase price for the purchase of the said property. Kumarasamy then affirmed that, he had no interest in the said property until he came to know that, Saravana did not maintain the overdraft account granted by Malayan Banking Bhd, satisfactorily.

- g** Malayan Banking Bhd. proceeded with foreclosure proceedings and, obtained an order for sale of the said property. Kumarasamy did not contest these proceedings as affirmed by him, since he was no longer the owner of the said property and that, he could not contact the defendant.

- h** Kumarasamy next became aware of the said property again, when he read of his name in an advertisement in the newspaper, relating to the said property. He immediately contacted the said bank and, was informed that a buyer could be found to purchase the said property. This would ensure the outstanding sum due to the said bank would be repaid.

On 25 January 1990, Kumarasamy entered into an agreement with Poh and Bay to purchase

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the said property for RM165,000. According to the solicitor one Miss Tay Siew Fong, who acted for both the vendor and purchaser in this transaction, Kumarasamy received part of the purchase price, while the rest was utilised to repay the said bank, agent's commission and legal fees. **a**

On 17 July 1990, Poh and Bay became the registered owners in equal share of the said property. **b**

While Miss Tay was acting for Kumarasamy, Poh and Bay in the aforesaid transaction, a letter was written to the defendant, requesting the defendant to deliver vacant possession of the said property. During this period, Kumarasamy by letter, assured that the defendant will vacate the said premises, on or before 20 November 1990. However, this did not materialise and hence led to this action before this Court.

The legal argument posted by the plaintiffs is simply that s. 340 of the National Land Code provides the plaintiffs, who are the registered proprietors, an indefeasible title to the said property. As such the defendant has no claim over the same. **c**

The defendant's Counsel, Mr. Tennakoon, however based his defence mainly on the exceptions provided for under s. 340(2) (c) of the National Land Code.

Section 340(2)(c) of the National Land Code reads as follows: **d**

The title or interest of any such person or body shall not be indefeasible - where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

Mr. Tennakoon argued that, Kumarasamy had been paid the full purchase price by the defendant and, though the said property was not transferred and registered in the name of the defendant, Kumarasamy held the said property on trust for the defendant and as such, had no power to dispose off the same to Poy and Bay. Since the said property was transferred, the title of Poh and Bay and their subsequent successors in title in the said property, are defeasible under the provision of s. 340(2)(c) of the National Land Code. **e**

To support his contention that Kumarasamy was at the material time, only a "bare trustee" under the aforesaid circumstances, the learned Counsel quoted to this Court the decision of the Supreme Court in *Chua Hee Hung & Ors. v. OBE Supreme Insurance Bhd.* [1990] 1 MLJ 480. In the judgment Lee Hun Hoe CJ (Borneo) at para B, it is stated as follows: **f**

In Peninsular Malaysia the law is clear, viz. the vendors after receipt of the full purchase price and surrender of possession of the lands to the purchasers are deemed to be bare trustees for the purchasers (see *Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors.* **g**

In the first instance, after careful consideration of the facts of this case, this Court finds no merits in the defendant's contention that, Kumarasamy was a bare trustee to begin with.

In order to qualify to be a "bare trustee", one must do more than just paying the balance of the purchase price and, handing over possession of the property. This must be followed up with the necessary action to convey the property into the name of the purchaser, as registered proprietor in the document of title. The vendor should execute a memorandum of transfer and, proceed to free the property from any encumbrances, such as charges and, on the part of the purchaser, a caveat should have been placed over the property, to protect his interest during the interim period. **h**

In this case, though the defendant contended that he had paid the full purchase price to **i**

*a* Kumarasamy, there were absolutely nothing proceeded upon to effect the transfer of the said property into the name of the defendant. No transfer form was executed by the parties. Instead of discharging the said property, a fresh charge was created for overdraft facilities to Saravana. Surely, if there was a genuine sale between Kumarasamy and the defendant, this would be the moment to transfer the said property to the defendant and, the defendant can then charge the same to the bank for overdraft facilities to his own company.

*b* The case of *Karuppiyah Chettiar v. Subramaniam* [1971] 2 MLJ 116, which was quoted by the said defendant's Counsel, in support of his contention of the rights and title of bare trustee, is distinguishable from the facts of this case. In *Karuppiyah's* case, a transfer form was executed but not registered. The purchaser therein also took further steps to protect his interest by lodging a caveat over the said land. In this case, before this Court, these acts were gravely absent, so much so that, coupled with other purported facts as disclosed in the affidavit of the defendant and, the statutory declaration of Kumarasamy, this Court is in doubt whether the sale and purchase of the said property, between the defendant and Kumarasamy, was actually completed.

*c* Proceeding further from the above, this Court further finds that, the purported facts as alleged by the defendant, have no bearings whatsoever on s. 340(2)(c) of the National Land Code, to make the title or interest of the plaintiff defeasible. Firstly both Poh and Bay were not persons purported to have exercised any powers or authority conferred by written law to have acquired the said property unlawfully.

*d* Both Poh and Bay were in fact ordinary purchasers, exercising their ordinary legal rights to purchase a property for valuable consideration. They were not persons, whose power and authority were conferred by statutory law of which, this particular provision of the National Land Code is meant to apply.

*e* The second major contention of the defence is that, the sale by private treaty between Kumarasamy and Poh and Bay after an order for sale was granted, in pursuance to foreclosure proceedings instituted by the said bank, is unlawful. As it is unlawful, s. 340(2)(c) of the National Land Code will also apply to make the title and interest of the plaintiff defeasible.

*f* In respect of this second contention, Mr. Tennakoon relied on the case of *The Chartered Bank v. Packiri Maideen & Anor.* [1963] MLJ 276 where Gill J. (as he then was) said as follows:

*g* It is observed that ss. 149 and 154 of the Land Code contemplate the sale of land by public auction. It is of course open to the parties to sell lands by private treaty before any proceedings are commenced in Court, but once such proceedings are commenced the lands have to be sold by public auction.

*h* However, this Court is in full agreement with the judgment of Wan Adnan J in *Chung Khiaw Bank Ltd. v. Lau Ah Yen & Anor.* [1989] 2 MLJ 247, where the aforesaid proposition in *Packiri Maideen's* case that once proceedings are commenced the lands have been sold by public auction is no longer valid, in view of the existence of s. 266(1) of the National Land Code.

*i* Section 266(1) of the National Land Code allows the chargor a right to tender payment, at any time before the date of auction, after an order for sale has been made. This therefore allows the chargor, to effect a sale by private treaty on the property provided, he can tender the outstanding payment as specified in s. 226(2) of the National Land Code, to the Registrar of the Court or, the Collector as the case may be, before the auction date. The tendering of

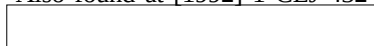
this outstanding sum can also be to the appointed representative of the Registrar of the Court or, the Collector as the case may be, and once payment is tendered the order for sale cease to have any effect. The appointed representative can well be the chargees of the property.

In this case before this Court, there are no evidence that the aforesaid was not carried out. The defendant has not adduced any evidence to the contrary that, the laid down procedure under s. 266(1) of the National Land Code, was not complied with when Poh and Bay purchased the said property from Kumarasamy, after an order for sale was made thereto. Such being the case, one cannot say that this sale and purchase was unlawful.

While the defendant's Counsel seemed to be engrossed with s. 340(2)(c) of the National Land Code, the defence have totally overlooked the fact that, the said property has now been transferred by Poh and Bay to the plaintiffs. The plaintiffs are purchasers in good faith and for valuable consideration of the said property. This fact has never been denied or disputed by the defendant. Such being the case, the plaintiffs have the added protection under the proviso of ss. (3) of s. 340 of the National Land Code, where their title or interest cannot be set aside once registered.

For reasons aforesaid this Court grants to the plaintiffs prayer (1) , (2), (3) and (4), of the originating summons.

Also found at [1992] 1 CLJ 432



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